89-550

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.:

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LINDA CANTRELL AND HUSBAND,
JEWELL CANTRELL,

Petitioners

v.

ROBERT N. BUCHANAN, JR., M.D.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSE MIDDLE DIVISION

James A. Johnson of
JOHNSON, WEIS, PAULSON & PRIEBE, S.C.
Attorneys for Linda Cantrell and
Jewell Cantrell

28 N. Stevens Street
Post Office Box 1148
Rhinelander, Wisconsin 54501
(715) 369-5060

32 pp

QUESTION PRESENTED FOR REVIEW

Whether the statute of limitations, Tennessee Code Annotated Section 29-26-116, violates the due process rights of plaintiff, Linda Cantrell, by barring her medical malpractice claim before her cause of action ever accrued?

TABLE OF CONTENTS

	Page
List of All Parties to the Action	1
Reference to All Reports of Opinions Delivered Below	1
Grounds on which Jurisdiction is Invoked	1
Statutes and Constitutional Provisions	2
Statement of the Case	3
Argument for Approval of Petition	8
Appendix Index	10
Appendix	1a

TABLE OF AUTHORITIES CITED

Cases

Page

Jones v. Morristown-Hamblen Hospital Assn. Inc., 595 S.W.2d 816 (Tenn. Ct. App. 1979) 5

Tennessee Statutes

Tennessee Code Annotated Section 29-26-116(a) (3) 2,8

Tennessee Code Annotated Section 29-26-116 i

Tennessee Code Annotated Section 29-26-116(3) 4,5

Other Authorities

28 U.S.C. Section 1257(a) 1,8

United States Constitution, Amendment XIV, Section 1 2

LIST OF ALL PARTIES TO THE ACTION

All parties to this action are named in the caption of the case to the Court.

REFERENCE TO ALL REPORTS OF OPINIONS DELIVERED BELOW

None of the opinions delivered below were published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On June 5, 1989, the Supreme Court of Tennessee denied the plaintiff permission to appeal this action. On March 22, 1989, the Court of Appeals of Tennessee, Middle Section at Nashville, affirmed the August 10, 1988 ruling of the Third Circuit Court for Davidson County, Tennessee, granting defendant's motion for summary judgment in this action.

Plaintiffs believe that 28 U.S.C. section 1257(a) confers jurisdiction on this Court to review the judgment by writ of certiorari.

STATUTES AND CONSTITUTIONAL PROVISIONS

Tennessee Code Annotated Section 29-26-116

(a) (3):

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The plaintiff, Linda Cantrell, first saw defendant, Dr. Buchanan, on April 22, 1967, for treatment of acne. She was then 18 years old. Dr. Buchanan prescribed x-ray treatments for Linda's condition. These treatments continued periodically from April 22, 1967, until January 1975. The total treatment was at least 750 rads. Her thyroid gland was subjected to radiation exposure during these treatments.

On June 30, 1986, Linda Cantrell sought medical treatment for a nodule in her neck, and a nodule in her nose. The nodule in her nose was removed on August 25, 1986, and proved to be metastatic papillary thyroid carcinoma.

Linda had additional surgery on September 19, 1986, to remove additional cancer in her body, as well as to remove

her thyroid. Following the surgery, Dr. J. Michael Crane, the surgeon, spoke to Linda's entire family. Dr. Crane told them that Linda's cancer was caused by the radiation therapy she had received many years earlier. This was the first time Linda Cantrell discovered that her cancer was caused by Dr. Buchanan's care and treatment of her acne.

Linda Cantrell filed this action on September 11, 1987, alleging malpractice and fraudulent concealment. The Third Circuit for Davidson County granted the defendant's Motion for Summary Judgment on August 10, 1988, holding that Tennessee Code Annotated Section 29-26-116(3) barred Linda Cantrell's claim because she brought her action more than three years after the date on which the negligent act or omission occurred.

The plaintiffs' raised the constitutional question on appeal to the Tennessee Court of Appeals during oral argument. Despite the fact that the Tennessee Court of Appeals found the circumstances of this case to be compelling, that Court affirmed the trial court's order granting the defendant's Motion for Summary Judgment based on the three years statute of repose found in Tennessee Code Annotated Section 29-26-116(3), ruling that the constitutional argument raised by the plaintiffs' was addressed and rejected in Jones v. Morristown-Hamblen Hospital Assn., Inc., 595 S.W.2d 816 (Tenn. Ct. App. 1979). The Tennessee Court of Appeals stated:

> "Jones held that, under due process principles, '[a] statute of limitation . . . may not be given retrospective application so as to bar an accrued right of action, but may bar a cause of action which has

not yet accrued or vested.' Jones, 595 S.W.2d at 820. After Teeters v. Currey, 518 S.W.2d 512 (Tenn. 1974), discovery became a condition precedent to the accrual of a right of action for medical malpractice. When the Medical Malpractice Review Board and Claims Act took effect on July 1, 1975, the plaintiff in Jones had not discovered her injury and, therefore, had no accrued right of action. Since retrospective application of what is now Tenn. Code Ann. section 29-26-116(a) would not impair a vested right, the court held such application constitutional.

In the present case, as in Jones, the plaintiffs' had not discovered the injury as of July 1, 1975, when the Medical Malpractice Review Board and Claims Act took effect. Since there was no accrued right of action, retrospective application of Tenn. Code Ann. section 29-26-116(a) (3) does not constitute a denial of due process.

The Jones dissent does not help the plaintiffs' case. The dissenting judge based his opinion on factors not involved in the present case.

Courts have rejected similar due process challenges to Tennessee's statute of repose for products liability cases. See Wayne v. Tennessee Valley Authority, 730 F.2d 392 (5th Cir. 1984), cert.

denied, 469 U.S. 1159 (1985); Mathis v. Eli Lilly and Co., 719 F.2d 134 (6th Cir. 1983). Both Wayne and Mathis include discussions as to the rationality of the products liability statute of repose. In its equal protection analysis in Harrison, the Supreme Court concluded:

> This Court cannot say that there is not a reasonable basis for the separate classification of health care providers or that this classification bears no legislative objective of reducing and stabilizing insurance and health costs and protecting the public as a whole. Indeed, at the time Sec. 23-3415(a) [now sec. 29-26-116(a)] was passed, 'there was indubitably a valid reason for the distinction made' by the statute.

Harrison, 569 S.W. 2d at 827 (quoting Dobbins v. Terrazzo Machine & Supply Co., 479 S.W. 2d 806, 810 (Tenn. 1972). Moreover, rational basis analysis is unnecessary where there is no right deserving of due process protection. Thus, the court in Mathis stated:

> In tort claims, there is no cause of action and therefore no vested property right in the claimant upon which to base a due process challenge until injury actually occurs. An injury in the nature of a tort which occurs after a specified limitation period, such as the discovery of cancer, as in the instant case, does not give rise to due process protection.

Mathis, 719 F.2d at 141. This reasoning was the basis of the majority opinion in Jones."

ARGUMENT FOR APPROVAL OF PETITION

This case clearly falls within the jurisdictional requirements of 28 U.S.C. section 1257(a) for allowance of the writ of certiorari, in that the validity of a Tennessee statute is drawn in question on the ground of its being repugnant to the Constitution of the United States. Tennessee Code Annotated Section 29-26-116(a) (3) bars a plaintiff's claim for

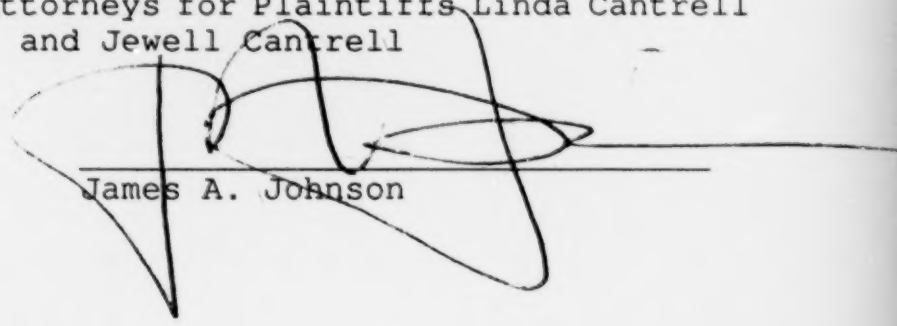
medical malpractice before her cause of action ever accrues, thereby denying a plaintiff of a property right without due process of law.

The Tennessee courts have considered this constitutional question and ruled against Linda Cantrell. The Supreme Court of the United States has the power to grant this Petition, and make a final ruling on this constitutional question.

The plaintiffs' respectfully request this Court to grant this Petition for Writ of Certiorari.

Dated this 26th day of September 1989.

JOHNSON, WEIS, PAULSON & PRIEBE, S.C.
Attorneys for Plaintiffs Linda Cantrell and Jewell Cantrell



James A. Johnson

APPENDIX

INDEX

	Page
Memorandum	1a
Order of Honorable Matthew J. Sweeney	6a
Opinions Affirming and Remanding by Honorable Ben H. Cantrell . . .	8a
Denial of Application for Permission to Appeal	18a

August 10, 1988

IN THE THIRD CIRCUIT COURT FOR
DAVIDSON COUNTY,

TENNESSEE

LINDA CANTRELL AND	)	
JEWELL CANTRELL	)	
	)	No. 87C-3069
VS.	)	
	)	
ROBERT N. BUCHANAN, JR., M.D.	)	

MEMORANDUM

This medical malpractice case is before the Court on the defendant's motion for summary judgment. For the reasons stated below, the motion is granted.

From April, 1967 through January, 1975 plaintiff Linda Cantrell received radiation therapy treatment for acne. In August, 1986 Linda Cantrell was diagnosed as suffering from cancer of the thyroid. She alleges that the defendant was negligent in administering radiation treatments and that

the treatments caused the cancer. The defendant asserts three bases for summary judgement: that he met the standard of care in his treatment of Linda Cantrell,[1] that the treatment did not proximately cause the injury claimed[2] and that this suit is barred by the statute of limitations. This third issue is determinative.

The defendant's statute of limitations argument has two aspects. First, the defendant contends that the plaintiffs did not file their suit within one year of discovering that Ms. Cantrell had tyroid cancer. T.C.A. § 29-26-116(a)(2). This is not the appropriate legal standard, however. Foster v. Harris, 633 S.W.2d 304 (Tenn. 1982). In Foster the plaintiff contacted serum hepatitis, the source of which was initially unknown to him, when the disease was first discovered. Later it

was determined that it was caused by the tortious conduct of his dentist. The defendant moved for summary judgment on the ground that suit was filed more than one year after the disease was discovered. The trial court dismissed the case and the Court of Appeals affirmed. The Supreme Court reversed and held that the one year statute of limitations did not begin to run until the plaintiff discovered that a negligent act was the source of the disease and the identity of the tortfeasor. Id. at 305. In this case such discovery did not occur until September 12, 1986. Linda Cantrell's affidavit. In that this suit was filed on September 11, 1987, summary judgment on this ground is denied.

The defendant's second argument regarding the statute of limitations is based upon T.C.A. § 29-26-116(3) which provided:

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists.

In some circumstances a physicians' failure to disclose to a patient information regarding treatment may constitute fraudulent concealment. Hall v. DeSaussure, 41 Tenn. App. 572, 581-83 (1956). Ray v. Schiebert, 484 S.W.2d 748, 753: Duncan v. Leeds, 742 F.2d 989, 992 (6th Cir. 1984). The plaintiffs contend that Dr. Buchanan knew or should have known of the risks and dangers associated with radiation therapy, that he knew or should have known that such treatment could cause cancer and that he never advised Linda Cantrell of any risk of cancer. Amended Complaint ¶ ¶ 2,3; affidavit of Linda Cantrell ¶ 5. There is no evidence in the record that he had knowledge of any wrong done. The contention that he "should have known" is insufficient. Albert v. Sherman, 67 S.W.2d 140, 167 Tenn. 133, 136 (1933). The limitation period, therefore, was not tolled and the action is barred by T.C.A. § 29-16-116(3).

The defendant's motion for summary judgment is granted. Costs are taxed to

the plaintiff. Defendant's counsel is requested to prepare the order.

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[1]The only competent evidence on this issue are the affidavits of Frank G. Witherspoon, M.D., and of Bernard J. Pass, M.D. They support defendant's contention that his treatment of Linda Cantrell met the standard of care. The affidavit of Stanton Marks, M.D., is not competent under T.C.A. § 29-26-115(b) and, therefore, has not been considered. However, there is a genuine issue both as to the total number of treatments given and regarding the use of shielding during treatment; both of those issues impact the Witherspoon and Pass testimony.

[2]The affidavit of pathologist Jere W. Baxter, M.D. supports the contention that the radiation treatment did not proximately cause Linda Cantrell's thyroid cancer. He states that "none of the normal or abnormal tissue removed during the September 19, 1986 surgical procedure discloses any evidence of damage or change caused by exposure to radiation." The affidavit, however, does not indicate whether some observable change or damage to such tissue is always present in each instance where radiation exposure is casually related to the development of thyroid cancer. The Court can make no presumption in that regard.

s/ Matthew J. Sweeney, III
Judge

August, 1988

IN THE THIRD CIRCUIT COURT FOR
DAVIDSON COUNTY
TENNESSEE

LINDA CANTRELL AND HUSBAND, JEWELL CANTRELL,	)	
Plaintiffs,	)	No. 87c-3069
v.	)	
ROBERT N. BUCHANAN, JR., M.D.	)	
Defendant.	)	

ORDER

This cause came on to be heard before the Honorable Matthew J. Sweeney, III, Judge of the Third Circuit Court for Davidson County, upon the motion of the defendant, Robert N. Buchanan, Jr., M.D., for a summary judgment in his favor.

Following argument on the motion, the Court entered its Memorandum Opinion, a copy of which is Exhibit "A" and is incorporated herein by reference.

There is no genuine issue as to any

material fact and the defendant is entitled to judgment in his favor as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff's action is dismissed with prejudice. Costs are taxed to the plaintiffs and their surety for which let execution issue if necessary.

s/ Matthew J. Sweeney, III, Judge

March 22, 1989

E X H I B I T A

LINDA CANTRELL AND JEWELL CANTRELL,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 88-334II Davidson Law
ROBERT N. BUCHANAN, JR., M.D.	)	
Defendant-Appellee.	)	

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

OPINION

The trial court dismissed the plaintiffs' medical malpractice claim on the grounds that it is barred by the applicable statute of limitations, Tenn. Code Ann. §29-26-116(a) (1980). The plaintiffs appeal.

The facts relevant to this appeal can be briefly stated. From April of 1967 until January of 1975, plaintiff-appellant Linda Cantrell received intermittent

radiation treatments while under the care of defendant-appellee Dr. Robert Buchanan for acne. In late August or early September of 1986, Mrs. Cantrell learned that she had cancer. According to the plaintiffs, on either September 12 or September 19, 1986, Mrs. Cantrell first discovered that her cancer was caused by the radiation therapy she received under Dr. Buchanan's care.

On September 11, 1987, the plaintiffs filed this malpractice action against Dr. Buchanan alleging negligence and intentional deceit. The defendant moved for summary judgment. The trial court granted the motion on the ground that Tenn. Code Ann. §29-26-116(a)(3) bars the action.

Under Tenn. Code Ann. §29-26-116(a)(1), the statute of limitations in medical malpractice actions is one year. Tenn.

Code Ann. §29-26-116(a)(2) codifies the discovery rule. However, Tenn. Code Ann. §29-26-116(a)(3) establishes a 3-year statute of repose:

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred . . .

Only in cases involving fraudulent concealment or negligent leaving of a foreign object in a patient's body is the three-year cap inapplicable. See Tenn. Code Ann. §29-26-116(a)(3)-(4).

In the present case, the latest date on which any alleged negligence occurred is January of 1975. Suit was filed in September of 1987, more than three years after the negligent act. This case does not involve a foreign object. In their appeal, the plaintiffs do not assign error to the trials court's finding that there is

no evidence to indicate fraudulent concealment. Therefore, Tenn. Code Ann. 29-26-116(a)(3) bars the claim.

On appeal, the plaintiffs request that this court avoid the harsh consequences of Tenn. Code Ann. §29-26-116(a)(3) by applying the discovery rule. The discovery rule would not bar this action filed on September 11, 1987 since Mrs. Cantrell did not discover the alleged source of her cancer until, at the earliest, September 12, 1986. See Foster v. Harris, 633 S.W.2d 304 (Tenn. 1982).

The circumstances of this case are compelling: Tenn. Code Ann. §29-26-116(a)(3) bars the plaintiffs' right to seek redress before they even knew about the injury. Despite the harshness of this result, this court cannot simply abrogate the legislature's enactment. The Supreme

Court upheld the constitutionality of Tenn. Code Ann §29-26-116(a)(3) in Harrison v. Schrader, 569 S.W.2d 822, (Tenn. 1978). (The court took notice of the medical malpractice insurance crisis which prompted the legislature to enact the three-year cap.) The court noted that, in the absence of constitutional defects, such policy matters are for the legislature, not for the courts. Id.

At oral argument, the plaintiffs raised a constitutional issue not addressed in Harrison v. Schrader. Relying on Jones v. Morristown-Hamblen Hospital Assn., Inc., 595 S.W.2d 816 (Tenn. Ct. App. 1979), the plaintiffs assert that applying Tenn., Code Ann. §29-26-116(a)(3) retrospectively so as to cut off the plaintiffs' right to redress before they had discovered the injury.[1]

The constitutional issue raised by the plaintiffs was addressed and rejected in Jones. Jones held that, under due process principles, "[a] statute of limitation . . may not be given retrospective application so as to bar an accrued right of action, but may bar a cause of action which has not yet accrued or vested." Jones, 595 S.W.2d at 820. After Teeters v. Currey, 518 S.W.2d (Tenn. 1974), discovery became a condition precedent to the accrual of a right of action for medical malpractice. When the Medical Malpractice Review Board and Claims Act took effect on July 1, 1975, the plaintiff in Jones had not discovered her injury and, therefore, had not accrued right of action. Since retrospective application of what is now Tenn. Code Ann. §29-16-116(a) would not impair a vested right, the court held such application constitutional.

In the present case, as in Jones, the plaintiffs had not discovered the injury as of July 1, 1975 when the Medical Malpractice Review Board and Claims Act took effect. Since there was not accrued right of action, retrospective application of Tenn. Code Ann. §29-26-116(a)(3) does not constitute a denial of due process.

The Jones dissent does not help the plaintiffs' case. The dissenting judge based his opinion on factors not involved in the present case.

Courts have rejected similar due process challenges to Tennessee's statute of repose for products liability cases. See Wayne v. Tennessee Valley Authority, 730 F.2d 392 (5th Cir. 1984), cert. denied, 469 U.S. 1159; Mathis v. Eli Lilly and Co., 719 F.2d 134 (6th Cir. 1983). Both Wayne and Mathis include discussions as to the

rationality of the products liability statute of repose. In its equal protection analysis in Harrison, the Supreme Court Concluded:

> This Court cannot say that there is no reasonable basis for the separate classification of health care providers or that this classification bears no reasonable relation to the legislative objective of reducing and stabilizing insurance and health costs and protecting the public as a whole. Indeed, at the time Sec. 23-3415(a) [now §29-26-116(a)] was passed, "there was indubitably a valid reason for the distinction made" by the statute.

Harrison, 569 S.W.2d at 827 (quoting Dobbins v. Terrazzo Machine & Supply Co., 479 S.W.2d 806, 810 (tenn. 1972)). Moreover, rational basis analysis is unnecessary where there is no right deserving of due process protection. Thus, the court in Mathis stated:

> In tort claims, there is no cause of action and therefore no vested property right in the claimant upon

> which to base a due process challenge until injury actually occurs. An injury in the nature of a tort which occurs after a specified limitation period, such as the discovery of cancer, as in the instant case, does not give rise to due process protection.

Mathis, 719 F.2d at 141. This reasoning was the basis of the majority opinion in Jones.

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Davidson County for the collection of the costs in that court. Tax the costs on appeal to the appellant.

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[1]Tenn. Code Ann. §29-16-103 (repealed 1985) provided that the Medical Malpractice Review Board and Claims Act would "not affect any malpractice actions commenced or filed before July 1, 1975." From this provision, the Jones court concluded that the legislature intended the Act to have retrospective application "since any suit filed after July 1, 1975, would fall within the Act's provisions without regard to the date of the negligent act giving rise to the cause of action." Jones, 595 S.W.2d at 819. In 1985, the legislature repealed all

sections of the Act concerning the medical malpractice review board, including Tenn. Code Ann. §39-26-103. See Act of April 8, 1985, ch. 184, §4, 1985 Tenn. Pub. Acts, 340, 341. However, the plaintiffs do not argue (and this court should find no reason to conclude) that this repeal indicated a legislative intent to preclude retrospective application of the remaining provisions of the Act. Rather, the legislature repealed the review board provisions because the board had gone out of existence §4(a), 1985 Tenn. Pub. Acts 341.

s/ Ben H. Cantrell, Judge

Concur:

s/ Henry F. Todd, Presiding Judge

s/ William C. Koch, Jr., Judge

June 5, 1989

IN THE SUPREME COURT OF TENNESSEE
AT
NASHVILLE

LINDA CANTRELL AND HUSBAND, JEWELL CANTRELL,	)	
Appellants,	)	
vs.	)	Davidson Circuit
ROBERT N. BUCHANAN, JR., M.D.	)	No. 88-334-II
Appellee.	)	

IN RE: APPLICATION FOR PERMISSION TO APPEAL OF LINDA CANTRELL AND HUSBAND, JEWELL CANTRELL

Upon consideration of the application for permission to appeal and brief in support thereof of Linda Cantrell and Husband, Jewell Cantrell, the answer of Robert N. Buchanan, Jr., M.D., the opinion of the Court of Appeals and the record in the cause,

Permission to appeal is denied at the cost of appellants.

PER CURIAM